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Br. of Richards for Appellees

Supreme Court

OCTOBER TERM, A. D. 1898.

Filed Nov. 11, 1898.

THE MISSOURI, KANSAS & TEXAS TRUST COMPANY, *Petitioner*,

vs.

THEODORE M. KRUMSIEG AND LOUIS M. KRUMSIEG, *Appellees*.

APPELLEES' BRIEF.

ON WRIT OF CERTIORARI TO THE UNITED STATES' CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

J. B. RICHARDS,

Attorney for Appellees.

COMMERCIAL PRINTING CO., DULUTH.

UNITED STATES

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vs.

THEODORE M. KRUMSIEG AND LOUIS M. KRUMSIEG, *Appellees*.

APPELLEES' BRIEF.

The decree of the court below should be affirmed for the reasons given, namely:

1. Because the contract is illegal and void as made in violation of the insurance laws of the state of Minnesota, being an entire and indivisible contract; and the mortgage, a dead thing, a mere cloud on the plaintiff's title, should be removed.

2. On account of usury in the contract.

Appellees make five main propositions in this brief:

1. The contract of the petitioner's notes and mortgage is unenforceable and void under the settled law of the state of Minnesota as a life insurance contract, made in violation of the state insurance laws.

2. The contract is unenforceable and void under the settled law of the state of Minnesota, as being usurious.

3. The decisions and construction by the Supreme Court of the state of Minnesota of its state statutes, and of the effect and character of the petitioner's contract is binding upon this court.

4. That the appellees are entitled to the relief sought in the pending action by virtue of the state statute in relation to the removal of clouds upon the title of lands in the state of Minnesota.

5. That the appellees are entitled to the relief sought under the statutes and decisions of the state of Minnesota relating to the cancellation of usurious securities, without being required as a condition of such relief to pay or tender to the petitioner, principal, and lawful interest, of the sum loaned.

The authorities to maintain propositions four and five will be grouped under one head under title number one.

I.

APPELLEES ARE ENTITLED TO HAVE THE MORTGAGE CANCELLED OF RECORD, WHETHER THE SAME IS VOID FOR USURY OR IN VIOLATION OF THE STATE INSURANCE LAWS.

This action is based upon section 5817 of the General Statutes of 1894, of the state of Minnesota, as follows:

> "An action may be brought by any person in possession by himself or his tenant, of real property against any person who claims an estate or interest therein, or *liens upon the same*, adverse to him, for the purpose of determining such adverse claim, estate, lien or interest."

Plaintiff's possession is alleged in appellees' complaint (paragraph 1 thereof, page 2 of the transcript), and is admitted in petitioner's answer to the complaint. (Folio 17 of transcript, page 15, second paragraph of the answer.)

Under this statute, if appellant's mortgage lien is shown to be invalid *for any cause*, appellees in possession may have judgment declaring the invalidity and determining appellant's claim and lien, and adjudging title in appellees free therefrom.

The old equity rule regarding the tender of principal and lawful interest before usurious contracts may be set aside has no application in this case, except to the question of usury.

If, therefore, this court shall agree with the decision of the Circuit Court of Appeals, that the contract is a life insurance contract, therefore void under the Minnesota law and decisions, appellees are entitled to have the decree affirmed entirely independent of any question of usury in the case, and the whole burden of the petitioner's brief becomes immaterial herein, as far as same relates to the claim that a tender of principal and lawful interest should be made as a condition of maintaining the appellees' action.

The right of the different states to legislate upon the question of removing clouds from the title to real estate within their several boundaries exists unquestioned. It has many times been affirmed by this court.

Reynolds vs. Crawfordsville First Nat'l Bank, 112 U. S., 405.
Holland vs. Challen, 110 U. S., 15.
Clark vs. Smith, 13 Peters, 195.
Chapman vs. Brewer, 114 U. S., 158 (170.)
United States vs. Wilson, 118 U. S., 86.
More vs. Steinbach, 127 U. S., 70.
Cowley vs. N. P. R. R. Co., 159 U. S., 569.
Roberts vs. N. P. R. R. Co., 158 U. S., 1.
Rich vs. Braxton, 158 U. S., 375.
Bardon vs. Land and River Imp. Co., 157 U. S., 327.
155 U. S., 58.
Arndt vs. Griggs, 134 U. S., 316.
Fitch vs. Creighton, 24 Howard, 159.
Broderick's Will, 21 Wallace, 503 (520).
Ex Parte McNeil, 13 Wallace, 236 (243).

In Clark vs. Smith, 13 Peters, 195, the court says:

"Kentucky has the undoubted power to regulate and protect individual rights to her soil *and to declare what shall be a cloud on titles*; and having so declared, the courts of the United States by removing such clouds are applying an old principle to a new equity created by the legislature, having its origin in the peculiar nature of the country."

Again, in the same case, the court says:

"The undoubted truth is, that when investigating and decreeing on titles in this country, we must deal with them in practice as we find them and accommodate our modes of procedure in a considerable degree to the nature of the case and the character of the equities involved in the controversy, *so as to give effect to state legislation and state policy*; not departing, however, from what legitimately belongs to the practice of a court of chancery."

The above was a bill in equity to compel the defendant to release his pretended title to certain lands in the state of Kentucky.

The statute of Indiana, construed in 112 U. S., 405, Reynolds vs. Crawfordsville Bank, is broader than the statute of Minnesota, because it allowed an action to be brought by any person, either in *or out of possession*, to determine adverse claims upon the title. The court declared in substance that this Indiana statute *dispensed with the general rule of courts of equity*, that in order to maintain a bill to quiet title it was necessary that the plaintiff should be in possession, and in most cases that his title should be established at law and founded on undisputed evidence or long continued possession.

The court uses the following language:

"It may be conceded that the legislatnre of a state cannot directly enlarge the equitable jurisdiction of a circuit court of the United States. Nevertheless, an

enlargement of equitable rights may be administered by the circuit courts as well as by the courts in the state. Broderick's Will, 21 Wallace, 503 (520). And although a state law cannot give jurisdiction to any federal court, yet it may give a substantive right of such a character that when there is no impediment arising from the residence of the parties the right may be enforced in the proper federal tribunal, whether it be a court of equity, admiralty or common law. Ex Parte McNeil, 13 Wallace, 236 (243.)

"While, therefore, the courts of equity may have generally adopted the rule that a deed void upon its face does not cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the legislature of the state in which the court sits to ascertain *what constitutes a cloud upon the title, and what the state laws declare to be such*, the courts of the United States, *sitting in equity*, have jurisdiction to remove."

The court proceeds to say, on page 411 of the same case:

"If the equity courts of the United States in Nebraska *could dispense with all these well established rules of equity and administer rights conferred by this statute*, it is not open to question that in this case the circuit court could disregard similar rules and entertain jurisdiction of the appellee's case and accord to him the rights conferred by the state law, even though the deed under which appellant claims was void on its face. As the same statute authorizes the court to take cognizance of the case even when the title of the defendant amounts to nothing more than a mere cloud, *and applies in every case when the defendant claims an adverse interest in or title to the property in controversy*, it is clear that the assignment of error under consideration has no support."

In this case, the simple allegation that petitioner claims a lien on the property in question adverse to the complaint would have been sufficient when accompanied, as it is, by that of possession of plaintiffs.

Ely vs. Railroad Company, 129 U. S., 291.
Wilder vs. City of St. Paul, 12 Minn., 192 (G. 116.)

In 12 Minn., 192 (G. 116) *supra*, the court says (page 122–3): "Possession of the plaintiff, by himself, or tenant, and an adverse claim by the defendant, *are the only facts which the statute requires to constitute a cause of action.*" citing 2 Minn., 153, (G. 129) Steele vs. Fish.

Under such an allegation any proof is admissable showing invalidity of the lien for any cause. But the complaint plead in detail facts showing the invalidity of the lien of the mortgage on two separate and distinct grounds, viz; invalidity of the life insurance contract, and facts showing usury. The prayer for judgment is to determine the adverse claim of the defendant, and for cancellation of the usurious security.

The above statute unquestionably confers a very substantial right. The effect of petitioner's contention is to destroy the right of the several states to grant such privileges in connection with the removal of clouds upon the title of lands within their limits. Upon reason as well as upon authority it is submitted that this contention is wholly unsound, and that any mere rule of evidence or matter of practice in federal courts in equity, admiralty or common law must give way to a substantial right and rule of property, and be moulded so as to give it full effect. Such, undoubtedly, is the law.

Beach on Modern Equity Practice, Sec. 6.
Foster on Federal Practice, Sec. 7, 2nd Ed.; Sec. 298, 1st Ed.

Mr. Beach lays down the rule as follows (Sec. 6):

"Although the equity jurisdiction of the courts of the United States is subject to no limitation or restraint by the state authorities and is uniform throughout the

different states of the Union; and their practice in equity is not affected by the laws of a state in which they sit; yet, *when a state statute creates a right* and prescribes a mode of proceeding to enforce it in the state courts, *the courts of the United States in that state will enforce the right*, but not always in the mode prescribed by the state law. * * * * Nevertheless, it is desirable when a court of the United States is enforcing a right created by a state statute to follow as near as may be the practice prescribed by the state statute."

Mr. Foster lays down the rule as follows, after stating the general rule as to equity courts' jurisdiction:

"If, however, the *customary* or *statutory law* of a state has created a new right, the federal courts will enforce the same at law or equity if it falls within the remedies authorized by either branch of their jurisdiction."

The general principle above cited is well expressed in the following language of this court in 101 U. S.. 153, Cummings vs. National Bank. On page 157 the court says:

"And though we have repeatedly decided in this court that the statute of a state cannot control the mode of procedure in equity cases in federal courts, nor deprive them of their separate equity jurisdiction; we have also held that where a statute of a state *created a new right or provided a new remedy*, the federal courts will enforce that right either on the common law *or equity side* of its docket, as the nature of the new right or new remedy requires. Van Norden vs. Morton, 99 U. S., 378. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute is to be enforced, and can only be appropriately enforced on the equity side of the court."

And no doubt such is the correct view of the law upon reason and on authority. In addition to the authorities above cited the following maintain the same proposition:

Parker vs. Dacres, 130 U. S., 43.
Chicago Union Bank vs. Kansas City Bank, 136 U. S., 223.
Etheridge vs. Sperry, 139 U. S., 267.
Brine vs. Insurance Co., 96 U. S., 627.
Orvis vs. Powell, 98 U. S., 176.
Life Insurance Co. vs. Cushman, 108 U. S., 51.
Lippincott vs. Mitchell, 94 U. S., 766.
McGoon vs. Scales, 9 Wallace, 23.
United States vs. Fox, 94 U. S., 315.
Clark vs. Graham, 6 Wheat, 577.
United States vs. Crosby, 7 Cranch, 115.
Cummings vs. National Bank, 101 U. S., 153.
Pearsoll vs. Smith, 149 U. S., 231.
Boone vs. R. R., 139 U. S., 684. (In this and the preceding case, the federal court in equity follows the state law of limitations.)

In the state court where this action was brought for the relief sought, appellees were secured in these substantial rights.

Can they be deprived of them by the mere formal removal of the case by the mortgagee to the federal court, that, too, sitting in the same jurisdiction though in equity? I submit not. In Ex Parte McNeil, 13 Wall, 236, (243) this court said:

> "A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there on the same principles and its determination is governed by the same considerations as if it had been brought in the proper state tribunal of the same locality."

But appellees did not go into the federal court to invoke the equitable jurisdiction, but brought their action under the state law giving clear right to the relief sought. Petitioner is seeking to apply to appellees the same rule as if plaintiff had sought relief, by going to the state of New York or Missouri seeking a federal equity jurisdiction. In such case it might be held as in Warner vs. Foote, 6 Fed-

eral, 461, cited by petitioner; that, having submitted themselves to a foreign equitable jurisdiction of the federal court they are deprived of the right that would exist in their favor if the action had been brought under the home jurisdiction; but such case is not in point. It was affirmed in this court on another proposition in 112 U. S., 600, solely on the point that plaintiff could not maintain the action because she was not the *owner of the stock pledged*. The remarks of the circuit judge on the subject of usury were apparently incidental and recognized that a different rule might apply had the case been brought in the New York jurisdiction where the contract was made and where the law authorized the relief, without the previous tender of principal and lawful interest But, if authority at all, the case is overborne by 71 Federal Rep., 350, and 77 Federal Rep., 32, directly in point.

The remarks of Justice Caldwell on page 111 of the transcript of record herein, leave nothing to be said on this proposition:

> "It will be conceded," he says, "that if this suit had remained in the state court where it was originally brought, that the appellees would have had the benefit of the state statute. Did they lose that right by the removal of the case into the federal court? The practice in the federal courts in suits in equity is regulated by themselves and by rules established by the Supreme Court of the United States under the authority of an act of Congress, and are uniform throughout the United States and cannot be varied by the state laws. But the question in this case is not one of mere practice but of substantive law. The bill seeks to cancel a mortgage on real estate situated in the state of Minnesota; the mortgage is a cloud upon the title of complainant which, under the statute of Minnesota, he is entitled to have removed unconditionally. The mode of proceeding to accomplish this result is the same in

the federal courts that it is in the state courts, namely, by bill in equity. The statute is not therefore a practice act; it abrogates a rule of equity and secures to the maker of the usurious securities (and he might add, the maker of a note which is void under the insurance laws of the state) a substantive right which may be enforced according to the established and well understood equity practice. It is immaterial whether this right be called legal or equitable; it is an absolute right, and one of which no court can deprive the party. Its enforcement is not dependent on the discretion of the chancellor, nor can a rule of decision based on the supposed authority of the maxim that 'he who seeks equity must do equity,' prevail over a positive statute expressly abrogating that rule of decision. When a court of equity is called upon to deal with a right given by statute, then it accepts and acts upon that other maxim that 'equity follows the law.' It is not competent for any court to take from the citizen a right secured to him by a valid exercise of legislative power."

In Cowley vs. N. P. R. R. Co., 159 U. S., 569, *supra*, identical in principle with the facts here, the court said:

"But while, after the removal of the case to the circuit court of the United States, it might properly be docketed and tried by the court as an equity suit, it still remained, so far as the rights of the plaintiff were concerned, a special proceeding under the territorial statute; and the powers of the court in dealing with it were gauged, not merely by its equity jurisdiction, but by the special authority vested in its own courts by the statutes of the territory. Had the case never been removed to the circuit court, it would have proceeded in the state court as a special proceeding under the territorial statute, and we are of the opinion that, *upon its removal to the circuit court, petitioner lost no*

right to which he would have been entitled had the case not been removed. Even if it were treated as in form a bill in equity, the right of the complainant would be gauged as well by the statute under which the bill was filed as by the general rules of equity jurisprudence. If any action or proceeding in a state court were subject to be defeated or impaired by one of the parties exercising his statutory right to remove it to a federal court, no one would be safe in instituting such a proceeding in any case wherein, by reason of diversity of citizenship or otherwise, it might be subject to removal. While the federal court may be compelled to deal with the case according to the forms and modes of proceeding of a court of equity, it remains in substance a proceeding under the statute, with the original rights of the parties unchanged.

"Although the statute of a state or territory may not restrict or limit the equitable jurisdiction of the federal courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the federal courts may enforce on their equity or admiralty side, precisely as they may enforce a new right of action given by statute upon their common law side. Thus, in Ex parte McNeil, 13 Wall., 236, a statute of the state of New York giving to the pilot who first tendered his services to a vessel, and was refused, a right to half pilotage, was held to be enforceable upon the admiralty side of the district court. See, also, the cases of Broderick's Will, 21 Wall., 503, 520, and Clark vs. Smith, 13 Pet., 195, 203. So, in Reynolds vs. Bank, 112 U. S., 405, 5 Sup. Ct., 213, a bill in equity under a statute of Indiana, which averred that a deed was void upon its face, was held sufficient to support the jurisdiction of the circuit court of the United States in that district, to quiet the title of complainant as against such deed, although courts of equity had generally adopted the rule that a deed void

upon its face does not cast a cloud upon the title which a court of equity will undertake to remove. It is also said in Davis vs. Gray, 16 Wall., 223, 231, that 'a party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state court of the same locality. The wise policy of the constitution gives him a choice of tribunals.' Other cases to the same effect are Holland vs. Challen, 110 U. S., 15, 3 Sup. Ct., 495; Marshall vs. Holmes, 141 U. S., 589, 12 Sup. Ct., 62; Johnson vs. Waters, 111 U. S., 640, 4 Sup. Ct., 619; Arrowsmith vs. Gleason, 129 U. S., 86, 9 Sup. Ct., 337.

"The case having been removed to the circuit court upon petition of defendant, it does not lie in its mouth to claim that such court had no jurisdiction of of the case, unless the court from which it was removed had no jurisdiction."

A word as to the logic of the petitioner's position and the authorities cited in its brief. They are all cited to illustrate the principle above set forth in the quotation from Mr. Beach on Modern Equity Practice, section 6, in the following language:

"That the equity jurisdiction of the courts of the United States is subject to no limitation or restraint by the state authorities and is uniform throughout the different states of the Union, and their general practice in equity is not affected by the laws of a state in which they sit."

We submit that such rule and decisions as applied in this case show mere superficial understanding of the meaning of the language above cited.

The jurisdiction of the federal court is not attacked in this case. No question of jurisdiction arises. It is conceded. These cases, if in point, are flatly opposed by the doctrine of the cases above cited, wherein this court has

recognized a substantial right given by a state law and conformed its equity practice thereto.

But when analized it would fairly seem that no case cited, either in the dissenting opinion of judge Sanborn, of the Eighth Circuit, or by counsel for the petitioner, is in reality in point in this discussion.

Green's Administrator vs Creighton, 23 How., 90, was decided upon the question of jurisdiction, whether the plaintiff, a foreign creditor, was entitled to maintain an action brought in equity in the federal court. No such question arises here. In that case there was a clash between the state law and United States law. Here, there is no clash. United States law, in that case, gave the plaintiff a right to seek a remedy in the federal court.

Clark vs. Bever, 139 U. S., 96, was similiar, as to the right of a foreign creditor under act of Congress to prove his claim against the estate of decedent in the United States court.

Union Bank vs. Jolly's Administrator, 18 How. 503, was a similiar case, involving the probate laws of a state. Payne vs. Hook, 7 Wallace, 425, which appears to be a leading case, belongs to the same category as 23 How. 90, 129 U. S., 96; namely, proceeding of a foreign creditor to collect against estate of decedent, where it was held that the effect of the upholding of the probate proceeding would have been to restrict the jurisdiction directly vested by act of Congress in the non-resident. Such also is Suydam vs. Broadnax, 14 Peters. In these cases it is the question of the jurisdiction of the federal court in equity under United States law where it conflicts with the jurisdiction given under state law, and as to the right at all of the party to have the federal court assume jurisdiction. Manifestly such jurisdictional questions cannot be in point in the case at bar. Robinson vs. Campbell, 3 Wheat., 211, contains nothing, we submit, in conflict with our position; but on the contrary, the statute distinctly declares the

general rule of law that remedies, in respect to real estate, are to be pursued according to the laws of the place where the estate is situated, which is exactly what we contend for in this case; that the mortgagors are entitled to the remedies given them by the laws of the state of Minnesota. United States vs. Howland, 4 Wheat., 108, in our view simply relates to the mode of the protection of a right, a mere matter of practice; and it was conceived that the method of procedure in chancery in the federal court was ample to protect all parties in their essential rights. Noonan vs. Lee, 2 Black, 499, seems to relate solely to a question of the practice of the court. The court chooses not to enforce, in the form of its decree, what seemed to be the practice in the state court in such cases, in allowing a deficiency judgment in an action for the foreclosure of mortgages. On the other hand, in Russell vs. Southard, 12 How., 138, and in Neves vs. Scott, 13 How., 267, cited in some of the cases as tending to support the main proposition of petitioner, expressly recognized an exception where a *custom* or a *state* law gives substantial right; namely, in 13 How., 267, the syllabus says:

> "*Unless the general principles of equity have been modified by the laws and usages of a particular state,* those general principles will be carried out everywhere."

And says on page 271 of the opinion:

> "No question has arisen concerning any state law in Georgia."

In Russell vs. Southard, 12 How., 138, the court states that it is not obliged to follow the state rule of evidence on a question depending on general principles, as to whether parol testimony can be introduced to show a deed absolute on its face to be a mortgage. One ground for its opinion was that there was no statute in Kentucky bearing upon the question of admission or rejection of oral proof in such cases. We submit that the facts of none of the

cases cited in petitioner's brief are in point with those of the case at bar. The question is, can a state law on the subject of usury, in actions to remove clouds on title, be enforced? If the state law is not controlling in favor of the appellees in this case, why should it be controlling in case the mortgagee should have brought his action to foreclose the mortgage in the federal court by bill in equity? In that case, the defendant (mortgagor) sets up the state usury laws and offers to pay no principal nor lawful interest, and pleads perfect bar against the plaintiff's right. Will it be said that the relief will be granted to the plaintiff and his mortgage foreclosed flat in the face of the state law on the subject of usury? Certainly not. And yet, to give the defendant the relief prayed for in his answer would deprive the plaintiff of his right in equity to have at least his principal and lawful interest repaid. It seems to counsel that the contention of counsel for petitioner, in effect, would prevent any state from passing any valid law on the subject of usury, or to allow actions to be maintained to remove clouds from title. On the whole, appellees are not able to present any more logical, thorough and sound reasoning to support the decision of the Court of Appeals in this case than is found in the opinion of Justice Caldwell, as printed in the transcript of record herein, beginning on page 107, and in the opinion of justice Thayer concurring on page 114.

II.

IT IS SETTLED LAW, AND AN ESTABLISHED RULE OF PROPERTY IN THE STATE OF MINNESOTA, THAT A PLAINTIFF SUING TO CANCEL A MINNESOTA CONTRACT FOR USURY NEED NOT OFFER TO REPAY THE SUM LOANED WITH LAWFUL INTEREST.

Scott vs. Austin, 36 Minn., 460, decided in 1887.

Exley vs. Berryhill, 37 Minn., 182.

Recently (1897) re-affirmed and recognized as against the petitioner in this case, in Matthews vs. Missouri, Kansas and Texas Trust Co., 72 N. W. Rep., 121 (Minn.)

In this latter case the court expressly refused to reverse its decisions in the former case upon the request of petitioner's counsel. These decisions were based upon the statutes of 1878, (sections 2217 and 2214, G. S. 1894.) The language of the statute is as follows: (Section 2217, G. S. 1894; chapter 23, section 7, G. S. 1878.)

> "Whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, contract, security or evidence of debt has been taken or received in violation of the provisions of this act, the court shall declare the same to be void and enjoin any proceeding thereon, and shall order the same to be cancelled and given up."

Section 2214, which is chapter 23, section 4, G. S. 1878.

> "All bonds, bills, assurances, conveyances, chattel mortgages, and all other contracts and securities whatsoever, and all deposits of goods for anything whatever whereupon and whereby there shall be reserved, secured or taken, any greater sum or value for the loan or forbearance of any money, goods or things in action, than is above prescribed, shall be void, except as to bona fide purchasers of negotiable paper, as hereinafter provided, in good faith for a valuable consideration before maturity. * * * In any case, however, where the original holder of an usurious note sells the same to an innocent purchaser, the maker of said note, or his representatives, shall have the right to recover back from the said original holder the amount of principal and interest paid by him on said note."

Section 2212, General Statutes of 1894 provides that any charge above ten per cent shall be usurious. The rule of law as laid down in 36 Minn., 460, and 37 Minn., 182, was the law in 1890, at the time when petitioner's contract in this case was made and thus the law became part of the contract of petitioner, as fully as if he expressly agreed in

the mortgage itself that the mortgagor might bring an action to cancel the mortgage for usury without tendering the principal and lawful interest.

Brine vs. Insurance Co., 96 U. S., 627.
Rees vs. City of Watertown, 19 Wallace, 107.

Petitioner, therefore, is in no condition to complain about the law of Minnesota on this point, being well advised of it before this contract was made, and as forming part of its contract, *and this court cannot refuse appellees the relief sought, except by changing the original contract of the parties.*

III.

THE CONTRACT IS ONE OF LIFE INSURANCE, IS VOID AND UNENFORCEABLE, AND SHOULD BE REMOVED AS A MERE CLOUD ON PLAINTIFF'S TITLE.

Gen. Stat., Minn., 1878, chap. 34, title 6, secs. 286, 287, 289, 291, 306, 355, 358, 316, 292, 296, 270.
Laws of 1887, sec. 1, chap. 183.
Gen. State., 1878, sec. 3, chap. 76, being sec. 5891, Gen. Stat., 1894, of Minnesota.
Seamans, Receiver, vs. Christian Brothers Mill Co., 66 Minn., 205.
Seamans, Receiver, vs. Temple Co., 105 Mich., 400.
Seamans, Receiver, vs. Zimmerman, 91 Iowa, 363.

Chapter 76, sec. 3, *supra*, or sec. 5891, Gen. Stat., 1894, is as follows:

> "A foreign corporation cannot maintain an action in this state upon an obligation or liability arising out of, or in consideration of, an act which is contrary to the law or policy of the state, or which is thereby forbidden in respect to corporations or associations therein whose general business is similar to that of such foreign corporation."

This statute is merely declaratory of the general rule of law prevailing in the states, as above cited. See also--

Cincinatti Ins. Co. vs. Rosenthal, 55 Ill., 91; 101 Ill., 206.
Aetna Ins. Co. vs. Harvey, 11 Wis., 364; 44 Wis., 387.
Rising Sun Ins. Co. vs. Slaughter, 20 Ind., 520; 46 Ind., 46.
Barber vs. Boehm, 21 Neb., 450.
Opinion of Justice Caldwell, transcript of record herein.

The statute is constitutional.

Paul vs. Virginia, 8 Wall., 168.
Hooper vs. California, 155 U. S., 648.
Cooper Mnfg. Co. vs. Ferguson, 113 U. S., 727.

The Minnesota statutes above cited are a follows:

"Sec. 286. It is *unlawful* for insurers or their agents to make, negotiate or solicit within this state any contract of insurance except as authorized by this act."

"Sec. 287. LIFE INSURANCE. No company hereafter organized in this state shall make insurance upon the lives of individuals, nor grant, purchase or dispose of annuities, unless organized solely therefor and doing such business exclusively."

By chapter 183, of the laws of 1885, foreign corporations have within the state the same rights and privileges and are subject to the same laws as domestic corporations, and are deemed domestic corporations. This is admitted in petitioner's brief, page 37.

"Sec. 291. Before any insurance company shall commence business in this state the following conditions shall be complied with: 1. It must be fully organized. 2. If it be a company not of this state a copy of its charter, duly accepted, etc., must be filed with the insurance commissioner of the state. 3. It must procure from the insurance commissioner of the state a certificate that it has complied with the conditions of the law of the state applicable to it, and that it is entitled to assume risks and issue policies within the state."

"Sec. 292. AGENTS TO HAVE CERTIFICATE OF AUTHORITY. PENALTY. No person shall act as agent in this state for any company not in this state, in any matter whatever relating to risks, until the last section (291) has been complied with on the part of the company, and he has received from the insurance commissioner a certificate of authority stating that the foregoing requirements have been complied with. * * * Any person or agent doing or attempting to do business in any way relating to insurance in this state without such certificate of authority in violation of this section, or after said certificate shall have been revoked, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding five hundred (500) dollars for each offense."

"Sec. 296. If any insurance company doing business in this state shall violate any of the provisions of this act, etc., every director, officer or agent of such company guilty of any wilful participation therein, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding one thousand (1000) dollars or by imprisonment in the county jail not exceeding three (3) months, or by both such fine and imprisonment in the discretion of the court."

"Sec. 270. THE TERM COMPANY DEFINED. The term company, as used in any provision of this act, subjecting companies to any obligation or restriction, includes individuals, partnerships, joint stock associations and corporations."

In Seamans vs. Christian Brothers Mill Co., 66 Minn., 205, above cited, the gist of the decision is in the syllabus, as follows:

"INSURANCE COMPANIES. STATUTORY REQUIREMENTS. EFFECT OF NON-COMPLIANCE. An insurance company which has not complied with the statutory require-

ments so as to be authorized to do business in this state, cannot recover premiums on a contract made within or without the state; and it makes no difference whether such company is a foreign corporation or merely a foreign mutual unincorporated association. Ganser vs. Ins. Co., 25 N. W., 943, 34 Minn., 372, holding that in such a case the insured may recover the loss distinguished, on the ground that the very object of the said statutory requirements is the protection of the insured, and the parties are not in *pari delicto.*"

The court says:

"These statutory provisions are police regulations intended to protect people and property in this state against spurious and irresponsible insurance companies. It is plainly the intent of these statutory provisions to compel all such insurers doing business in or taking risks on property in this state to comply with our local laws and submit to our local courts. * * * * The restrictions in our statutes are so many and the repressive character such that we must hold this to be the public policy of this state. This seems also to be the character of the insurance legislation in Iowa and Michigan, as appears by the case of Seaman vs. Zimmerman, 91 Iowa, 363, and Seaman vs. Temple Co., 105 Mich., 400, where this same receiver was defeated in attempt to collect unpaid premiums from citizens of those states. Neither does it make any difference that the insurer is a mutual company or that it is, as appellant claims, unincorporated. Neither is this decision in conflict with Ganser vs. Ins. Co., 34 Minn., 372, where it was held that the insured can recover the loss even though the insurer has not complied with the statutory requirements so as to be authorized to do business in this state. The very object of these statutory provisions is the protection of the insured, and parties are not in *pari delicto.*"

It is thus seen that no estoppel exists, as contended for by petitioner's counsel, under the settled law of the state of Minnesota, against a party seeking to evade payment of an insurance contract, void under the state laws. No authorities are needed to show that no such estoppel exists in usury cases.

It is, then, the settled law in the state of Minnesota, that any insurance contract, whether fire, marine, hail or life, made in violation of the state insurance laws is void and cannot be enforced. It is admitted in the answer of the petitioner (page 16 of the transcript of record, paragraph 6 of the answer) that the mortgagee has not complied with any of the laws of Minnesota respecting the transaction of life insurance business in this state.

Therefore, this particular mortgage contract of the petitioner must be held void and a mere cloud on plaintiff's title, if this court shall decide that the contract is one of *insurance*.

That it is a contract of insurance admits of no doubt, and is sustained by the authority of Justice Caldwell of the circuit court, and was evidently the idea of the supreme court of Minnesota in 59 Minn., 468; although the point was not necessary to the decision of the court in that case. The language of Justice Caldwell (page 113 of the transcript) is as follows:

> "Accepting the construction of this contract given by the appellant's expert witnesses, one of whom, to use his own language, 'invented the plan,' we must hold that the contract is, in the language of another of appellant's witnesses, 'a combination of a mortgage loan and a life insurance policy'."

For the testimony upon this point, see pages 78 and 79 of transcript, testimony of Arthur E. Stillwell; page 62 of transcript, testimony of John B. Lunger, who says: "In brief, the contract is *a combination of a mortgage loan*, payable in installments, *and a life insurance policy*."

The language of the supreme court of the state of Minnesota in M. K. & T. Trust Company vs. McLachlan, 59 Minn., 468, found on page 108 of the transcript, shows that the contract was deemed an insurance contract. Speaking of the contract the court says:

> "It is certainly unique, and after a careful study of all its provisions it seems clear to us that it must have been contrived for the purpose of evading either the insurance laws or the usury laws, or both, of this state."

The clause of the mortgage which is claimed to be an insurance feature is as follows (page 5 of transcript):

> "And it is further understood by and between the said parties of the first part, their executors, administrators and assigns, and the said party of the second part, the Missouri, Kansas and Texas Trust Company, that in case said Theodore M. Krumseig, one of the parties of the first part, *should die after the execution and delivery of the said notes and this mortgage, and within ten (10) years thereafter, each and every of the said notes remaining unpaid at the said date shall be surrendered to the executors or administrators of the said Theodore M. Krumseig, one of the parties of the first part, and this mortgage shall be cancelled and satisfied* provided, however, that said parties of the first part shall have promptly paid each monthly installment that shall have become due prior to his death, according to the terms of the said notes hereinbefore mentioned; and that he has not committed suicide within two years and has not, without the written consent of the party of the second part, visited the torrid zone, or personally engaged in the business of blasting, mining or submarine operations, or in the manufacture, handling or transportation of explosives, or entered into the service of any railroad train or of a steam or sailing vessel for two years."

Petitioner's claim is, that this contract is not one of life insurance, because there is no provision for any cash payment by it in case of death.

What is payment? Payment here is the full, agreed and exact equivalent of the actual cash loaned on the particular security. The cancellation of the notes and mortgage in case of death is in every respect the same to appellant as the payment of actual cash to the legal representatives. What was the object of the agreement if not to furnish means to pay the notes? Yet, forsooth, when the notes and mortgage are cancelled and satisfied they have not been "*paid.*"

What determines the character of a contract is its *legal effect.* "The tree is known of its fruit." There is no uncertainty as the amount due on the mortgage in case of death. No cash passes; but this is because the contract is graduated so that the amount due upon the "policy" is always the exact equivalent of the unpaid notes. The amounts are $30 less each month. Petitioner's liability ceases when any installment is not paid when due. (Page 5 of transcript.) The sum due on the "policy" is thus always exactly fixed and represented by the notes unpaid at the time of death.

"That is certain which can be made certain."

If this is not life insurance, what is it? In fire insurance, loss occurs by fire. In plate glass, hail and marine insurance it is loss by breakage, marine disaster and hail. In life insurance, loss occurs by death of the individual, through stoppage of income or of inability to pay by death. Indemnity is the idea pervading every kind of insurance, though in life insurance there is often possibility of something more.

May on Insurance, sec. 117, p. 130.
Ins. Co. vs. Bailey, 13 Wall., 616.
Phillips on Insurance, sec. 1.
Walker's American Law, p. 471.

Did not appellant *re-insure* its risk with the New Jersey Company? It admits that the New Jersey Company insured life for its benefit. Now, then, is not its own contract with appellees a *life insurance* contract? Appellees never had any dealings with the New Jersey Company. It is apparant from examination of petitioner's contract with the Prudential Company, (Exhibit "A," transcript, pages 30 31 and 32) that petitioner was the Prudential Company's agent receiving commission, 25 per cent on first year and afterwards 10 per cent on all premiums paid by the appellees. (Article 7, Ex. "A," page 32 of transcript.) And it further appears, that the contracts made between said parties were *insurance* contracts. (Arts. 1 and 2, Ex. "A," page 30 of transcript.) But this agency of petitioner was carefully concealed from appellees for obvious reasons. Appellees paid the $3.00 fee to petitioner and passed the medical examination required, and the medical report was then submitted by petitioner to the New Jersey Company, and upon its favorable report the notes and mortgage described in the complaint were executed and delivered.

That the character of the contract is one of life insurance is furthur illustrated in the stipulation in reference to *suicide*, visiting the *torrid zone*, and extra hazardous occupations found in all careful regular insurance policies, as well as by the great care taken to obtain a good and satisfactory "risk" by the medical examination.

The form of a contract is immaterial. It need not even be in writing.

> May on Insurance, sec. 1, 35, 27.
> 11 Am. and Eng. Enc. of Law, pp. 280–281.

It is submitted that this contract comes within all the definitions cited in petitioner's brief, and any other that could be given, of life insurance; and must be held to be a life insurance on the life of Krumseig, and it is submitted that the opinions of the supreme court of the state of Min-

nesota and of Justice Caldwell, of the Circuit Court of Appeals, on this subject are correct.

Therefore, it follows that the contract is void under the above cited law of the state of Minnesota. If it be claimed that the *insurance* part of it might be void, but that the rest of the contract could be enforced, the answer is that the contract is *indivisible and entire*. Each installment of $30 of the notes contained a portion of the principal sum loaned, a portion of the interest thereon, and a portion agreed to be paid for the insurance premium. But the part agreed to be paid for the insurance clause in the mortgage cannot be separated from the rest of the said notes, on account of the fact that no rate of interest is any where specified, but the notes are blanket in form for the full sum of $3600, payable in installments. The taint of the illegality, therefore, permeates each installment and every part of the notes; and the whole falls because the insurance contract was in violation of the law.

Parson on Contracts, Vol. 1, p. 380.
Smith on Contracts, secs. 177, 178, p. 206.

It is submitted, therefore, upon this ground alone, wholly independent of the usury feature of the contract, that the decree of the Circuit Court of Appeals should be affirmed.

IV.

THE CONTRACT IS USURIOUS AND VOID.

Mathews v. Missouri, Kansas & Texas Trust Co., 72 N. W. Rep., p. 121, (Minn.) decided in June, 1897.
M. K. & T. Trust Co. vs. McLachlan, 59 Minn., 468.
Krumsieg vs. M. K. & T. Trust Co., 77 Fed., 32; opinion contained in the transcript herein.
Krumseig vs. M. K. & T. Trust Co., 71 Fed., 350, and cases cited in the above opinions.

The supreme court of Minnesota, in its decision in 72 N. W. Rep., 121, *supra*, uses the following language:

"2. It is further objected by the defendant that the finding and decision of the trial court, to the effect that the notes and mortgage were usurious and void, are not supported by the evidence. The contract here in question, as evidenced by the notes and mortgage, is identical, except as to names, dates and amounts, which the contract held to be usurious in the case of Trust Co. vs. McLachlan, 59 Minn., 468, 61 N. W. Rep., 560, to which reference is here made for a statement of the general terms of the contract here in question. A like contract was also held usurious in the case of Trust Co. vs. Krumseig, 23 C. C. A. 1, 77 Fed. Rep., 32. We are unable to distinguish this case from the McLachlan case. The finding and decision of the trial court are sustained by the evidence."

In the case at bar, the contract is the one referred to by the supreme court in the above decision. This contract is identical, except as to names, dates, amounts and descriptions of property, with the contract held to be usurious in Mathews vs. M. K. & T. Trust Co., 59 Minn., 468, and 72 N. W. Rep., 121. The forms of the contract were on printed blanks of the trust company, both applications, notes and mortgages. Counsel submits, that these decisions of the supreme court of the state of Minnesota, construing this particular contract, are binding as a rule of action for this court upon the same, on this point of usury, as well as upon the proposition that an insurance contract of a non-resident corporation is void in the state of Minnesota, when made without complying with the state insurance laws.

Generally, upon the subject of usury, the following authorities are submitted:

Missouri Valley Life Ins. Co. vs. Kittle, 2 Fed. Rep., 113; 2 McCrary, 134.

National Life Ins. Co. vs. Hanley, 7 Fed. Rep., 805.

Doe vs. Barnard, 1 Esp. Rep., 11.

Clark vs. Sheehan, 47 N. Y., 188.

Utica Ins. Co. vs. Cadwell, 3 Wend., 296.
Fire Ins. Co. vs. Donaldson, 3 Edw. Ch., 199.
Chase vs. N. Y. Mortgage Co., 49 Minn., 111.

Appellant is presumed to have intended to do what it has deliberately done.

Fiedler vs. Darrin, 50 N. Y., 443.
Firemen's Ins. Co. vs. Ely, 2 Cowen, 708 (N. Y.).
Cleveland vs. Loder, 7 Paige, 587.

Only a fair preponderance of evidence is required to show usury.

M. K. & T. Trust Co. vs. McLachlan, 59 Minn., 468.
Lukens vs. Hazlett, 37 Minn., 441.

That the mortgagor might be wholly ignorant of the vicious character of the contract is wholly immaterial.

Lukens vs. Hazlett, 37 Minn., 441.
Marsh vs. Martindale, 3 Bos. & P., 154.
Thompson vs. Nesbitt, 2 Rich., 73.

This particular contract of the petitioner has been seven times before various courts of the United States for construction, and seven times it has been condemned as usurious; namely, twice in the district court of St. Louis county, Minnesota, viz, in the McLachlan and Mathews cases; twice in the United States Circuit Court for the district of Minnesota, before Judge Nelson, viz, in the cases Krumseig and John L. Foote; twice in the supreme court of the state of Minnesota, viz, in the McLachlan and Mathews cases; and once in the United States Circuit Court of Appeals in the pending case. It remains for this court to set its final seal of condemnation upon this particular form of contract.

The only difference between the case at bar and the McLachlan case above cited is, that the petitioner now chooses to deny what it freely admitted in the McLachlan case; namely, the value of the insurance feature of the contract. Defendant's counsel, in its brief, admits that

the McLachlan case was rightly decided. (Page 15 of its brief.) In the McLachlan case the insurance feature was admitted to be worth but $852.91, leaving $810.09 of exaction to be accounted for. The same relative discrepancy exists here; and counsel instead of admitting that this discrepancy is that of a charge for ordinary life insurance at Krumseig's age and on the amount risked, now chooses to contend that there is some endowment feature in the contract justifying the excessive charge made.

Appellees respectfully submit that there is no endowment feature in the contract, or any thing like it, or any thing that can show a fair equivalent for the amount of the notes.

The contract is seen in detail in the following table. One-tenth of the total of the notes is payable each year (or rather, 1–120th each month.) The one-tenth of principal is, (for convenience take, instead of $1970, $2000) $200; and the other $160 payable yearly is explained in the loan application as "interest and *cost of guarantee to cancel debt in case of death.*" (Transcript, page 42.)

Combined yearly payment is $360.

Year	Principal	Interest and Guaranty				
1	Payment, $360	($200 plus $160).	This $160 is		.08 on	$2,000 in use.
2	"	"	"	"	.088 on	1,800 "
3	"	"	"	"	.10 on	1,600 "
4	"	"	"	"	.114 on	1,400 "
5	"	"	"	"	.133 on	1,200 "
6	"	"	"	"	.16 on	1,000 "
7	"	"	"	"	.20 on	800 "
8	"	"	"	"	.266 on	600 "
9	"	"	"	"	.40 on	400 "
10	"	"	"	"	.80 on	200 "
	$3,600		10)2.261			10)11,000
			$ .26			$1,100

Divide 2.261 by 10, gives .26 average per cent.

Divide $11,000 by 10, gives $1,100 average sum in use.

In the first year the return to appellant is equivalent to eight per cent interest. Very fair and innocent! The tenth year only $200 is in use. In fact, only the average of $100 is actually in use the last year, on account of the monthly payments of $30. Yet, the same perennial $160 is exacted for its use, as is the case in each year on the constantly decreasing principal sum.

In the last year the $160 is 80 per cent interest on the $200; and is 160 per cent on the $100 actually in average use!

Average principal in use is thus $1,100.

Average interest and premium combined is thus 22 6-10 per cent per year on the sum in use.

If the calculation was based on the fact of *monthly* instead of *yearly* payments, the rate of profit would appear much greater.

Cost of "guaranty" is only $124.05 for the ten years, and averages $12.40 per year. This, figured down as interest on the average $1100 in use is less than two per cent per year. (Two per cent on $1100 is $22.) In the loan application the notes are said to be given for "principal, interest and *cost of guaranty* to cancel debt in case of death." (Transcript, p.42.) This (net) cost to appellant is proven to be only $124.05. Why is not this sum the *contract* limit of the value of that part of the consideration? We submit that it is and should be, and ask what is the basis of its exaction of $621.80 instead?

The rate will appear greater than 20.6 per cent per year, if, as is correct, the calculation should be based on the monthly instead of yearly payments.

Thus this contract exacts a profit on the loan equivalent to more than 20.6 per cent interest per annum. Appellant is not a building and loan society. This is admitted. For it, it is usury.

Another distinct and striking feature of this remarkable contract, and showing usurious intent is the extraor-

dinary result from the provision for ten per cent interest on each overdue installment, commencing at the very first and running all through the ten years.

Pike vs. Grist, 62 Ill., 461.

In ordinary contracts this provision cuts no material figure and is regarded rather in nature of a penalty. Here it reaches of itself alone the enormous total of $1,815.30.

If nothing were paid on the contract till its maturity the sum required in its liquidation would be $5,415.30 for loan of $1,970.

Considering that the statutes of limitation could not affect the mortgage (however it might affect some of the notes) this single feature provides for $1,291.25 excess over total principal, interest for ten years at ten per cent, and insurance premiums or guaranty.

$2,000 plus $2,000 interest, plus $124.05, equals $4,124.05. From $5,315.36 deduct the $4,124.05 leaves $1,291.25 as the net result and effect of this single feature of the contract. All that was necessary to make this clear profit of $1,291.25, aside from all other sources of profit, was to exact ample security by the mortgage, *as appellant did in this case.*

(As demonstration, there are 120 installments. Interest at ten per cent for each $30 for one month is $0.25. The first installment will double itself in the ten years. Interest on each of the succeeding installments is just $0.25 less than that of its predecessor, and the total is $1,815.30.)

A third ugly feature is, that while right to indemnify lapses upon default of payment on any single installment, when due, (transcript, fols. 6, 8) yet, there being no fixed or determinable premium charge, appellant's right to collect the whole sum of $3,600 is not impaired by such lapse. In such case the sum of $124.05, fairly chargeable for the ten years' premium, would all go to swell the profit on the loan as an additional source of usury (less only the pre-

miums already earned). This because appellant could claim exemption from any liability after default.

TABLE I.

Table showing "COST" to petitioner of its re-insurance of the Krumseig "RISK" computed according to the terms of its February 27, 1889, contract with the Prudential Insurance Company of America, of Newark, N. Y., (Ex. "A," pp. 30–33 of transcript) the contract being there described (Article 2) as the "Renewable, Reducing, Non-participating," "Term" plan, renewable for ten years, at premium rates set out in a table in the contract the amount of the insurance decreasing each year according to a table also set out in article 7 of said contract. Appellant took out its policy No. 4452 on Krumseig's life under the terms of the said contract of February 27, 1889, for $2,208. (Page 41 of transcript.)

Year	Age	Rate (quarterly)	Amt. Ins. per contract.	Annual Cost.
1	28	$2.86 on $1,000	$2,000	(5.82x4) –($22.88
2	29	2.92 " (2x902)	1,904	(2.92x3) (1000)
				(2.35x4) (804)– 21.08
3	30	2.99 "	1,658	(2.99x4) (1000)
				(1.96x4) (658)– 19.80
4	31	3.05 "	1,496	(3.05x4) (1000)
				(1.61x4) (486)– 18.24
5	32	3.13 "	1,320	(3.13x4) (1000)
				(1.00x4) (320)– 16.52
6	33	3.20 "	1,124	(3.20x4) (1000)
				(.40x4) (124)– 14.40
7	34	3.28 "	910	(2.98x4) (910)– 11.92
8	35	3.37 "	674	(2.27x4) – 9.08
9	36	3.45 "	414	(1.43x4) – 5.72
10	37	3.54 "	140	(.2x70) (.50x4)– 2.00
				$141.64

Total cost of its re-insurance with the Prudential company on basis of $2,000, its legitimate risk.

This, too, is to be reduced by petitioner's commission on the premiums paid, which, by the contract, are twenty-five per cent on the first year's premiums and ten per cent on those of each subsequent year. Appellant actually took out re-insurance for $2,208, or $208 more than its risk. This extra cost, however, cannot be taxed to the appelees in the calculation.

It got its indemnity for about *$19.23 less than Krumseig could have got it for.*

Yet appellant has the astonishing audacity to undertake to make the court think that it is entitled to charge, in its contract with plaintiffs, the rate of *endowment* policies, which are thirteen times ($92 per $1,000) as much for what only costs itself $6.20 per $1,000; and to undertake to make the court believe that the principle of so-called "endowment" enters into its contract, or that it is giving the "equivalent" of endowment insurance. (See pages 47, 51, 52, 55 of transcript, for testimony as to ordinary *endowment* rates.)

TABLE II.

Table showing cost to Krumseig in 1890, at the highest known rate for insurance on the amount risked by appellant in its contract with him. The rates of premium are those testified to by Squier and Covey (transcript, pp. 36–41), and the plan is that shown in the appellant's contract with the Prudential Insurance Company of America, of Newark, N. J., viz: "Renewable," "Reducing," "Non-participating," "Term" plan, covering the ten year period; and the amounts are those risked at the beginning of each year with *no* reductions on account of the monthly payments made under the contract, which really make the risk largely less than the following table shows:

Year	Age	Rate (annual	Am't Ins.		Annual Cost
1	28	$13.76 per $1000	$2000		$27.52
2	29	14.00 "	1800	[18/10 x $14.00]-	25.20
3	30	14.26 "	1600	[16/10 x 14.26]-	22.82
4	31	14.54 "	1400	[14/10 x 14.54]-	20.34
5	32	14.84 "	1200	[12/10 x 14.84]-	17.81
6	33	15.17 "	1000		- 15.17
7	34	15.52 "	800	[8/10 x 15.52]-	12.40
8	35	15.89 "	600	[6/10 x 15.89]-	9.54
9	36	16.31 "	400	[4/10 x 16.31]-	6.52
10	37	16.75 "	200	[2/10 x 16.75]-	3.35
		Total cost at highest known rates,		-	$160.67

The monthly deductions of the amount risked, by the payments so made, should reduce the actual cost certainly enough to *more than off-set extra cost to defendant of collecting its premiums monthly.* It paid its own premiums quarterly, and the difference between its annual and quarterly rate is set forth in the schedule of premium rates in its contract of February 27, 1889 (p. 31). Its annual rate per $1,000 is $10.80; the quarterly rate is $2.86, or $11.44 a year. This is only $0.64 per year more than if it paid once a year instead of quarterly. The difference in cost of annual, or quarterly, or monthly payments of premiums is not material.

The contract is *reduced* in amount in amount 1/120 each month. Of *principal* this is exactly $16 66 2/3. Interest at ten per cent for one month on the $16 66 2/3 is $0.13 8/10. Interest on the monies in the borrower's hands during the life of this contract, at ten per cent, so reducing $16.66 2/3 every month amounts to $1,008.20. The first year it is $190.82, the next year $170.82. It reduces $20 every year, or ten per cent of $2,000. Interest the last year would be $10.82.

Total principal,	$1,970.00
Total Interest (10 yrs. @ 10 per cent,	1,008.20
Total cost to appellant of its re-insurrisk, (really only $124.05)	141.64
Total consideration,	$3,119.84
Face of notes,	$3,600.00
Deduct actual consideration,	3,119.84
Total exaction,	$ 480.16

About *one-quarter* of the actual cash loaned!

Add to this exaction the commission earned by appellant, as agent, $17.59, makes the actual total exaction $497.75.

V.

THE DECISIONS AND CONSTRUCTION BY THE SUPREME COURT OF MINNESOTA OF ITS STATE STATUTES, AND THE EFFECT AND CHARACTER OF THE PETITIONER'S CONTRACT, IS BINDING UPON THIS COURT.

In addition to the authorities heretofore cited in title number one, which also bear upon the above proposition, the following are cited:

Bauerman vs. Blunt, 147 U. S., 647.
Peters vs. Bain, 133 U. S., 670.
Bergman vs. Bly, 66 Fed., 40.
Detroit vs. Osborne, 135 U. S., 492.
Union Bank vs. Kansas City Bank, 136 U. S., 223.
Etheridge vs. Sperry, 139 U. S., 267.
Christie vs. Pridgeon, 4 Wall., 196.
Opinion of Justice Caldwell in transcript.

And generally the character, interpretation, force and effect of a contract must be governed by the laws of the state.

"The laws of the state in which land is situated

control exclusively its alienation and transfer, and the effect and construction of instruments intended to convey it. United States vs. Fox, 94 U. S., 315; United States vs. Crosby, 7 Cranch, 115; Clark vs. Graham, 6 Wheat., 577; McGoon vs. Scales, 9 Wall., 23."

Opinion of Justice Caldwell, page 112 of transcript:

"All such laws in existence when contracts in regard to real estate is made, including the contract of mortgage, enter into and become a part of such contract. Brine vs. Hartford Fire Ins. Co., 96 U. S., 627." *Ibid.*

In 9 Wall., 23, *supra*, the court said (page 27):

"It is a principle too firmly established to admit of dispute at this day. that to the law of the state in which the land is situated must we look for the rules which govern its decent, alienation and transfer, and for the effect and construction of conveyances."

Here is the question of the construction, effect and validity of a mortgage upon land in Minnesota, made in Minnesota, to be enforced in Minnesota, and by which title to land may pass to the mortgagee.

The case is one, it would seem, where the rule cited unerringly applies with the fullest force.

In 96 U. S., 627, *supra*, the court (page 634) endorsed the following proposition:

"All the means by which the title to real property is transferred, whether by deed, by will or by judicial proceeding, are subject to and may be governed by the the legislative will of the state in which it lies, except where the law of the state on that subject impairs the obligation of a contract, *and all the laws of a state existing at the time a mortgage or any other contract is made, enters into and becomes a part of it*, and are obligatory on all courts which assume to give remedy on such contracts."

It is immaterial that the same statute is interpreted differently in the different states. The state law becomes by the interpretations, as far as it is a rule for the action of this court, a different law in one state from what it is in another. The court said in Bergman vs. Bly, *supra*, page 43:

> "The general rule is, that the laws of the several states shall be regarded as rules of decision in the courts of the United States in cases to which they apply. The judiciary act requires this, and it would be the law independently of that enactment. Under this rule the first question which confronts a federal appellate court is what is the local law applicable to the case? The local law which furnishes the rule of decision may consist of a statute or of the decisions of its supreme court, or both. The construction placed upon the state statute by the supreme court of the state is obligatory on the federal courts. The judicial interpretation of a statute becomes in effect a part of the text of the statute itself. It does not matter how like statutes in other states have been construed. The construction of a statute by the supreme court of the state from which the case comes is the law of that state and furnishes the rule of decision. It not frequently occurs that the same statute is differently interpreted, or the same question differently decided by the supreme courts of different states. When that is the case, the federal appellate court gives effect to the local law of the state applicable to the case. It does not attempt to reconcile the conflicting dicisions of the state courts or to adopt a rule of decision different from that established by the supreme court of the state from which the case comes. It contents itself by giving effect to the local law."

Nothing can well be added to the above. It disposes of the contention of petitioner's counsel, in his brief, that because formerly the construction of the Arkansas usury

statute was different from the present construction of the New York and Minnesota statutes, that it is necessary for this court to interfere and force a uniformity of decisions upon the local statutes of the different states. No principle of general commercial law is here involved. No one is deprived of vested rights and there is no discrimination against non-residents. In fact, the petitioner made this contract with the law of the state of Minnesota as part of the contract at the time it was made.

Counsel submits, therefore, that this court should affirm the decree of the Circuit Court of Appeals on either or both of the grounds therein set forth as found in the decision.

Respectfully submitted,

J. D. Richards
Duluth, Minn.

Attorney for Appellees.